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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 128

JOHN T. GOJACK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

	Page
Brief for Petitioner	
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	6
The Proceedings Below	13
1. The District Court	13
2. The Court of Appeals	16
Summary of Argument	16
Argument	23
I. The Committee's Hearing Was an Exercise of the Unconstitutional Power of Exposure	23
A. The Congressional Power of Investigation Must Be Confined to the Limits of the Legislative Process	24
B. The Committee's Exposure System	28
C. Petitioner Was Called for the Express Purpose of Exposing Him	34
D. The Government's Contentions	37
1. The Claimed *Bona Fide* Legislative Purpose	37
2. The Contention Concerning Motive	45
II. The Hearing Was a Proceeding to Attaint Petitioner	47
III. The Inquiry Violated the First Amendment	50

Page

IV. The Trial Court Erroneously Excluded Relevant and Material Evidence 53

V. Petitioner Was Not Advised of the Subject Under Inquiry or the Pertinency of the Individual Questions 57

VI. The Indictment Was Insufficient 59

A. The Failure to Specify the Matter Under Inquiry to Which the Questions Put to Petitioner Are Said to Be Pertinent 59

B. The Failure to Allege That Petitioner Acted Wilfully 65

VII. Petitioner Was Deprived of the Right to a Fair and Impartial Grand Jury 66

Conclusion 67

Table of Authorities

CASES:

American Communications Association v. *Douds*, 339 U.S. 382 50

Barenblatt v. *United States*, 360 U.S. 109 ..16, 27, 34, 35, 37, 45, 50, 52, 57

Barry v. *United States, ex rel. Cunningham*, 279 U.S. 597 24

Barsky v. *United States*, 167 F. 2d 241 34

Bates v. *Little Rock*, 361 U.S. 516 52

Bowers v. *United States*, 202 F. 2d 447 61

Braden v. *United States*, 365 U.S. 431 34

Butzman v. *United States*, 205 F. 2d 343 60

Cummings v. *Missouri*, 4 Wall. 277 47

Ex Parte Garland, 4 Wall. 333 47

Federal Trade Co. v. *American Tobacco Co.*, 264 U.S. 298 26

Flemming v. *Nestor*, 363 U.S. 603 ..... 48, 49

Frankfort Distilleries v. *United States*, 144 F. 2d 824 60

Page

Gariepy v. *United States*, 189 F. 2d 459 59
Gomilion v. *Lightfoot*, 364 U.S. 339 47
Hagner v. *United States*, 285 U.S. 427 59
Harriman v. *Interstate Commerce Commission*, 211 U.S. 407 25
Harrison v. *N.A.A.C.P.*, 360 U.S. 167 24
Interstate Commerce Commission v. *Brimson*, 154 U.S. 447 25
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 48
Kilbourn v. *Thompson*, 103 U.S. 168 ..... 16, 24, 35
Lowenburg v. *United States*, 152 F. 2d 22 60
Marshall v. *Gordon*, 243 U.S. 521 25
McGrain v. *Daugherty*, 273 U.S. 135 25
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 ..... 51, 52
N.A.A.C.P. v. *Patty*, 159 F. Supp. 503 24
Quinn v. *United States*, 349 U.S. 155 ..... 26, 34, 65
Reed v. *County Commissioners*, 277 U.S. 376 24
Rogers v. *U.E.R.M.W.A.*, Docket 119-56, SACB 42
Rolland v. *United States*, 200 F. 2d 678 60
Rumely v. *United States*, 197 F. 2d 166 58
Russell v. *United States*, No. 8, this Term 23, 38, 66
Scull v. *Virginia*, 359 U.S. 352 57
Sinclair v. *United States*, 279 U.S. 263 ..... 25, 54, 59, 60, 62
Sutton v. *United States*, 157 F. 2d 661 60
Talley v. *California*, 362 U.S. 60 52
United States v. *Bowers*, 202 F. 2d 447 61
United States v. *Carll*, 105 U.S. 611 60
United States v. *Cross*, 170 F. Supp. 303 55
United States v. *Debrow*, 346 U.S. 374, 203 F. 2d 699 ..... 61, 62
United States v. *Fields*, 6 F.R.D. 203 ..... 59-60, 61, 63
United States v. *Hess*, 124 U.S. 483 65
United States v. *Icardi*, 140 F. Supp. 383 ..... 44, 55, 61, 62
United States v. *Kamin*, 135 F. Supp 382 65
United States v. *Lamont*, 236 F. 2d 312 ..... 61, 65
United States v. *Lattimore*, 215 F. 2d 847 ..... 61, 63, 64
United States v. *Lovett*, 328 U.S. 48 47
United States v. *Louisville & Nashville R.R. Co.*, 236 U.S. 318 25-26

Page

United States v. *Orman*, 207 F. 2d 148 58
United States v. *Quinn*, 349 U.S. 155 22
United States v. *Seeger*, No. C-152-240 61
United States v. *Sullivan*, C-152-238 61
United States v. *Tobin*, 195 F. Supp. 588 54
United States v. *Waltham Watch Co.*, 47 F. Supp. 524 60
United States v. *Yarus*, C-152-239 61
Uphaus v. *Wyman*, 360 U.S. 72 52
Watkins v. *United States*, 233 F. 2d 681 .....14, 34, 53, 54, 55, 56
Watkins v. *United States*, 354 U.S. 178 ....3, 21, 22, 27, 28, 45, 57, 58, 59
Wilkinson v. *United States*, 365 U.S. 399 34
Yellin v. *United States*, No. 154 Misc. this Term .. 46

MISCELLANEOUS:

American Liberty: Aspects of Liberty, Roche (Cornell University Press, 1958) 52
Communist Control Act, 1954 4
Congressional Investigations of Communism and Subversive Activities, Summary-Index, 1918-1956 7
The Congressional Pillory, Donner (The Nation, February 28, 1961) 28
Fettered Freedoms, Nye (Michigan State College Press, 1959) 52
Holmes-Laski Letters, 1916-1935 25
Punishment: Its Meaning in Relation to Separation of Powers and Substantive Constitutional Restriction and Its Use, 34 Indiana Law J., 231, 234-249 47
Supplement to Cumulative Index of Committee on Un-American Activities, 1955-1956 7
The Un-Americans, Donner (New York, 1961) 28
U.S. News & World Report, August 26, 1955 33

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BRIEF FOR PETITIONER

Opinions Below

The decision of the District Court is not reported; it appears in the record at Tr. 449-451.[1] The opinion of the Court of Appeals (R. 215-232) is reported at 280 F. 2d 678.

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[1] The symbol "Tr." refers to the typewritten transcript of the record; "R." refers to portions of the record which have been presented and "Hearings" to the record of the hearings at which petitioner appeared, published by the Committee on Un-American Activities under the title, "Investigation of Communist Activities in the Fort Wayne, Indiana Area" and received in evidence as Government Exhibit 8 (Tr. 58).

Jurisdiction

The judgment of the Court of Appeals (R. 233) was entered on June 18, 1960. By order of Mr. Justice Black, entered on July 12, 1960 (R. 234), the time within which a petition for writ of certiorari might be filed was extended to August 17, 1960. The petition for a writ of certiorari was filed on August 16, 1960, and together with a motion for leave to proceed *in forma pauperis* was granted on June 5, 1961 (R. 235). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the Committee on Un-American Activities have the power under the Constitution to use its procedures for the purpose of attacking and exposing individuals and organizations as an end in itself and divorced from its power to investigate for legislative purposes?

2. If the Committee lacks the independent power of exposure, was the inquiry in this case undertaken for such non-legislative purpose?

3. If the Committee has the power to engage in such exposure activities as are reflected in the record in this case, does the contempt statute involved here, Title 2 U.S.C., Section 192, authorize punishment for refusals to answer all questions or only those questions which are in furtherance of an investigation for legislative purpose?

4. Did the specific questions involved here invade an area protected by the First Amendment?

5. If such questions did invade the First Amendment, did petitioner's refusal to answer them so clearly frustrate

an important and legitimate objective of the Committee as to warrant the invasion of petitioner's rights under the First Amendment?

6. Whether the entire proceeding resulting in petitioner's conviction is unconstitutional as a bill of attainder within the prohibition of Article I, Section 9, Clause 3 of the Constitution?

7. Whether the statute creating the Committee and defining its power is unconstitutional on its face or as applied in this case in that

(a) it exceeds the legislative power of Congress;

(b) it is too vague and indefinite;

(c) it abridges rights secured by the First Amendment;

(d) it violates the principle of separation of powers.

8. Whether the trial judge improperly excluded evidence in support of petitioner's contention that the Committee's purpose was to expose and injure him.

9. Whether in view of the vagueness of the Committee's authorizing statute, the Committee's announced purpose to expose him, and the other circumstances of the case, the pertinence of the questions which petitioner declined to answer to a matter under inquiry was "made to appear with undisputable clarity" within the meaning of *Watkins* v. *United States*, 354 U.S. 178, 214-215.

10. Whether an indictment under 2 U.S.C. 192 is insufficient because it fails to allege or specify:

(a) that the refusal to answer questions was deliberate or intentional; or

(b) the nature of the question under inquiry to which the *ad hoc* questions are alleged to be pertinent.

11. Is a defendant entitled to a dismissal of an indictment or a preliminary hearing thereon when he alleges by motion and affidavit that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment because of the fear engendered by operation of the government employees security program, a fear which amounted to actual bias and prejudice against him?

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property,

without due process of law, nor shall private property be taken for public use, without just compensation."

2 U.S.C. Sec. 192, R.S. 102 (52 Stat. 942), as amended, provides:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee, established by a joint or concurrent resolution of the two Houses of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 812, 823, 828) provides in relevant part:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"Rule XI

"Power & Duties of Committees

"(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively: . . .

• • • • •

"(q) (1) Committee on Un-American Activities.

"(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittees, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Rule 7 (c) F.R. Crim. Proc. provides in pertinent part as follows:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count."

Statement of the Case

A. The Proceedings Before the Committee

On November 19, 1954, Representative Francis E. Walter announced what the aims of the House Committee on Un-American Activities (hereinafter referred to as the Committee), would be when he assumed its chairmanship in January of the next year (R. 193-194, 214; Pet. Exhs. *id.* 9 and 9-A, *Washington Daily News,* November 19, 1954):

"Rep. Francis E. Walter (D., Pa.) who will take charge in the new Congress of House activities against Com-

munists and their sympathizers, has a new plan for driving Reds out of important industries. He said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a chance in a full glare of publicity to deny or affirm their connection with a revolutionary conspiracy—or to take shelter behind constitutional amendments.

"'By this means,' he said, 'active communists will be exposed before their neighbors and fellow workers, and I have every confidence that the loyal Americans who work with them will do the rest of the job.'"

* * * * *

"Hearings of a similar nature have been held in local areas, but Rep. Walter wants to make them bigger, with the public being urged as well as invited to attend.

"'We will force these people we know to be Communists to appear by the power of subpoena,' Rep. Walter said, 'and will demonstrate to their fellow workers that they are part of a foreign conspiracy.'"

The very first Committee hearing in the year 1955[7] under this announced program was scheduled to be held in Fort Wayne, Indiana, on February 21 (R. 22, 89). On February 9, a Fort Wayne newspaper printed a story quoting a statement made by the Chairman that petitioner would be called to testify before the Committee at Fort Wayne, Indiana (R. 136, 85). Petitioner, then an officer of the United Elec-

[7] See *Supplement to Cumulative Index to Publications of the Committee on Un-American Activities, 1955-1956, 84th Cong., p. 1; Congressional Investigations of Communism and Subversive Activities,* Summary-Index, 1918-1956, compiled by Senate Committee on Government Operations, 84th Cong., 2d Sess., p. 252.

trical, Radio and Machine Workers of America (UE) (referred to hereinafter as the Union), was not served with a subpoena until February 15 (R. 22, 173), his subpoena having been issued on February 10 (R. 173).

Because the proceedings might affect the outcome of a National Labor Relations Board election among the employees of the Magnavox Company, scheduled for February 24, in Fort Wayne, many—including petitioner—protested on behalf of the Union (R. 169-171). Petitioner's protest also charged that, three days before the public announcement of the hearing, Mr. George McClaren, the labor relations director of the Magnavox Company, whose employees were involved in the election, announced to the employees that petitioner would be subpoenaed (R. 86-87; Hearings 79, 152).

On February 14, a representative of the Union sought a postponement of the proceedings because of the pendency of the election (R. 69-74). The Chairman called in the press while this application was being made and announced in the course of a recorded hearing that "all of us are interested in seeing your Union go out of business, because we do not feel it is good for the United States" (R. 77). Further remarks antagonistic to the Union were made by Congressman Walter and by Congressman Moulder, who was also present (R. 72-73).

On February 15, a Fort Wayne newspaper printed a boldly-headlined story (R. 199), "House Un-America (sic) Committee Wants UE Out of Business." The story, under the by-line of a reporter present at the hearing called by Chairman Walter (R. 68-84), states, "Chairman Francis Walter (D-Pa.) and Rep. Morgan Moulder (D-Mo.), both declared the committee should try to break the hold of the Union on defense plants" (R. 199). Thus, an application for adjournment made to protect the Union from the preju-

dicial impact of the Committee's planned hearing resulted in a further attack on it by the Committee.

On February 17, the hearing was adjourned until February 28 (R. 23-24). On February 22, Committee Chairman Walter again sought to attack the Union. In a statement in the Congressional Record he called for the defeat of the Union in the collective bargaining election and urged the Magnavox employees to vote against it (101 C.R. 1906, 84th Cong. 1st Sess.). He complained of the "telegrams and letters demanding that the hearings be cancelled" and claimed that they were subversively inspired.[3]

Since the adjourned hearing was transferred to Washington, a second subpoena was issued on February 23 (R. 63). And again before the issuance of the subpoena, a local newspaper was briefed on its intended issuance as well as the purpose of the hearing. The *St. Joseph Herald-Press*, a newspaper in St. Joseph, Michigan, where the Union functioned as the collective bargaining agent for the employees of the Whirlpool Company, on February 21 printed a statement of the Committee Chairman, stipulated at the trial to be accurate (R. 140, 148), that the hearing would expose petitioner and another subpoenaed witness as "card carrying Communists" and that, "the rest is up to the community" (R. 205). The story went on to point out that "the hearing will precede by three days the N.L.R.B. representative election at Whirlpool" (*id.*).

At the commencement of the hearing petitioner's counsel filed a motion, to which were appended the two newspaper clippings referred to above, objecting to the hearings on the following grounds (Hearings, 20; R. 201-203):

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[3] Chairman Walter went on to explain that the "postponement was agreed to very reluctantly and only after it was feared that false and malicious charges against the committee by the UE might result in this communist-dominated union continuing as the bargaining agent in the vital defense plant."

"1. The committee is not engaged in a legislative investigation for a *bona fide* legislative purpose. This committee is limited under Article I, Section 1 of the United States Constitution to the exercise of legislative powers. The chairman of the committee has previously announced as is shown by the newspaper clippings attached hereto that the purpose of the hearing is to force the United Electrical, Radio and Machine Workers of America (UE) 'out of business' and that with respect to the movants Gojack and Jacobs 'to bring out the facts that they are card carrying Communists. The rest is up to the community.'

This purpose is not legislative in character and hence is outside the committee's powers.

"2. If the committee seeks to inquire into activities of a criminal nature, no specific charges have been furnished the movants and no evidence has been offered that they have violated any law.

In any event, the power to inquire into crime is one which is confided exclusively to courts and grand juries under Article I, Section 3 of the Constitution.

"3. The purpose of breaking a union is not one which is authorized by the committee's basic resolution, Public Law 601.

"4. Even if such a purpose were authorized by the committee's basic resolution, the resolution as so construed and applied would constitute a violation of the free speech and assembly guarantees of the First Amendment to the Constitution.

"5. The committee's basic resolution is in any event unconstitutional because no person can determine from it the boundaries of the committee's power.

"6. The committee intends, as its chairman has announced, to exact compulsory disclosures of movants' political beliefs and affiliations. The First Amendment forbids this particularly where as here there is no overriding legislative justification for such inquiry."

The motion, filed on behalf of the first three Union witnesses, was received by the Committee with the comment (Hearings 20) that "whatever action the Committee desires to take on it, we will take." After petitioner had declined to answer all of the questions which gave rise to the indictment, the Sub-committee Chairman announced (Hearings 155) that at the time the motion had been filed, "the members of the Sub-committee unanimously voted to overrule the objections and the motion to vacate subpoenas. Therefore, I want the record to show that at that time, *nunc pro tunc*, the objections and the motion to vacate subpoenas are overruled."

Not only was the action on the motion belatedly communicated to petitioner, but no statement was made to petitioner when he filed his motion describing the matter under inquiry. At the commencement of the entire hearing, the Sub-committee Chairman announced that the hearing would consider testimony (Hearings, 19) "relating to Communist Party activities within the field of labor, the methods used by the Communist Party to infiltrate labor organizations, and the dissemination of Communist Party propaganda." The record does not show that petitioner was present when the statement was made.[4]

Petitioner was subjected to an unusually comprehensive probe of his life—both public and private. He was asked

[4] The Government has pointed to the fact that petitioner objected to certain questions asked of the first witness (Hearings p. 72). But that is hardly proof that he heard Congressman Moulder's statement.

not only the conventional questions about his politics, but about his employment since 1935 (Hearings, 73-79), his draft status in World War II (Hearings, 81-83) and whether he had falsified a claim to a high school education (Hearings, 135-138).

Petitioner responded to most of the questions—about five hundred in number—but declined to answer the nine questions which gave rise to the indictment, both on First Amendment grounds and on the ground that the purpose of the hearing was an illegal one, exposure (Hearings 84, 86, 89, 102, 103, 104-105, 133, 149). In response to one question, the witness protested that (Hearings 134; R. 121), "I don't think the law under which this Committee operates was set up for exposure purposes. My understanding is that that is what the courts are for, to expose people." Congressman Scherer replied (R. 121), "Their job is to judge, not to expose. It is the job of this Committee to expose Communists. That is one of its primary duties, to expose Communists and the nature of the infiltration of the Communist conspiracy in every activity and agency of American life, which includes labor unions."

In answer to questions about whether he was a Communist, petitioner pointed to the fact that beginning in 1943 he had signed affidavits, pursuant to Section 9(h) of the Taft-Hartley Act, that he was neither a member of, nor affiliated with the Communist Party and that he neither believed in, was a member of, nor supported any organization dedicated to the overthrow of the United States Government by force or by any illegal or unconstitutional methods (Hearings 84, 88; R. 92-93).

B. The Proceedings Below

1. *The District Court*

Petitioner was indicted in December 1955 on a nine-count indictment under the contempt statute (R. 1-3). The six counts here in issue[3] rest on refusals to answer the following questions:

> 3. Are you now a member of the Communist Party?
>
> 4. You have left us under the impression at this point that by reading the newspapers you knew that Johnson was chairman of the Communist Party of Indiana and I am asking you if that is the only way you knew Johnson?
>
> 6. Mr. Gojack, did Mr. Elmer Johnson or Mr. Aron ever appear and address a group of people when you were present?
>
> 7. May I ask the witness, do you know whether or not Russell Nixon is a member of the Communist Party?
>
> 8. Did you take part in the peace pilgrimage to Washington which was organized by one of the "front" organizations known as the American Peace Crusade?
>
> 9. What method was used to get you as an original sponsor [of the American Peace Crusade]?

Petitioner moved to dismiss the indictment on the ground, among others, that the indictment lacked allegations of wilfulness (R. 4-5). Petitioner's motion further sought dismissal of the indictment, or a preliminary hearing, on the ground that less than twelve jurors on the grand jury which indicted him were impartial and free from bias

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[3] Counts 1, 2 and 5 are no longer in the case.

against him (R. 4-5). In support of the motion for a preliminary hearing, petitioner annexed an affidavit and an offer of proof that eleven members of the indicting grand jury were government employees; that two were unemployed and that wives and members of the immediate family of other grand jurors might have been employed by the Federal or District of Columbia Government. The affidavit in substance alleged that the operation of government employee security programs had engendered fears among those subject and potentially subject to such programs which resulted in actual bias and prejudice against petitioner (R. 6-7). The motion was denied (R. 14).

The case was tried before Judge (now Chief Judge) Pine from April 30, 1956 to May 3, 1956. *Watkins* v. *United States*, 233 F. 2d 681, was decided by the Court of Appeals on April 23, 1956. It was heavily relied on both by the government and the court (R. 192-193; Tr. 380, 403). Frank Tavenner, the Committee's counsel and the Government's sole witness, testified that in 1951 the Committee had heard testimony that the entire Union was saturated with Communists (R. 28-29). He also testified that in July 1953, another witness offered the information that a group of Union organizers (in a District other than petitioner's) were Communists (R. 29-30). No testimony was adduced that the Committee had information that petitioner was a "card carrying Communist," to use Chairman Walter's words, or any other kind of Communist.

Mr. Tavenner further testified (R. 31-34) that in 1947 Aron and Johnson (Indictment, Counts 4 and 6) had been identified as Communists before the Committee. But no testimony was adduced that the Committee had any basis for linking petitioner politically with these individuals. Similar testimony was presented that the individual (Russell Nixon) referred to in Count 7 had been identified as a

Communist (R. 97-107). The Government further showed that petitioner—together with other Vice-Presidents of the Union—received a letter from Nixon with an enclosure of a document calling for peace addressed to the Union, from the Metal Workers of Paris (R. 49-57). Finally, the Committee adduced evidence that the American Peace Crusade had, in 1951, been cited—by the Committee itself—as a "front organization" (R. 34-42) and that petitioner was one of its sponsors (R. 41-42).

Petitioner sought at the trial to introduce evidence to show that exposure was reflected in the Committee's activities through the years; that it was the characteristic way in which the Committee exercised its jurisdiction (R. 161-204; D.E. 9, 9A *id.*). Part of this evidence was admitted (R. 161-185), but a large portion was excluded (on the authority of the decision below in the *Watkins* case) and was included in the record as an offer of proof (R. 185-214, 360; D.E. 8, 9 *id.*).* The government objected, not on the basis of the best evidence rule or lack of authenticity, but solely on the ground the evidence was "immaterial and irrelevant under the *Watkins* decision" (R. 193).

Petitioner also introduced evidence that Labor Relations Director McClaren of the Magnavox Company had, during the period when the Union had been the collective bargaining agent for the Company's employees, obtained from the Committee material contained in petitioner's dossier while he was an official of the Union, and had circulated it among the employees (R. 156-160; 152-154; D.E. *id.* 5, 5A).

Petitioner attempted to elicit testimony that McClaren had in fact acquired advance information from the Committee that petitioner would be subpoenaed and had used

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* One item in D.E. 9 *id.* was the quotation which introduces this Statement (D.E. 9-A, R. 359-360).

it in the manner charged by petitioner (*supra*), but was barred on the Government's objection that the testimony was "immaterial and irrelevant" (R. 160).

The trial court ruled (Tr. 449-450) that "the committee was engaged in a valid legislative purpose. The fact that the inquiry resulted in exposure does not defeat the validity of the inquiry." It found petitioner guilty and sentenced him to nine months imprisonment and a fine of $2,000.

2. *The Court of Appeals*

The Court of Appeals in affirming the conviction ignored almost entirely the pattern of events which underscored the non-legislative purpose of the hearing. It gave no weight at all to the publicity about petitioner's subpoenas and the announced intention of the Committee's chairman to expose petitioner.

In ruling that the purpose of the hearing was adequately communicated to petitioner, the court below found this case indistinguishable from *Barenblatt* v. *United States*, 360 U.S. 109.

SUMMARY OF ARGUMENT

I

The hearing in this case resulted from a purpose to expose and injure petitioner.

A. We concede that the courts must be hospitable to Congressional inquiries, but it is equally true that the courts cannot tolerate usurpations of the law-enforcement function.

From *Kilbourn* v. *Thompson*, 103 U.S. 168, 191, until the Court's decision in *Barenblatt* v. *United States*, 360

U.S. 109, the Court has made it clear that there is no legislative power to investigate the private affairs of private individuals. Nor does the Congress or any of its Committees possess the power to investigate in order to punish a witness. This is a law-enforcement power confided exclusively to the courts.

B. The record in this case must be evaluated in the light of a pattern of exposure which has characterized the Committee's function from the beginning. The Committee's self-proclaimed purpose has been exposure. The "facts" are already known to the Committee and the investigative inertia is overcome not because of an investigative need for facts, but only because the names of new exposable victims have become known to the Committee. The Committee's exhaustiveness and its continuity demonstrate that it has transformed itself into a law enforcement tribunal.

The extraordinary stress on names explains the Committee's demand of witnesses that they inform on others—even when this demand means a sacrifice of the information which the witness possesses. The hearing is merely a forum in which the witness whose lack of cooperativeness is known in advance is exposed and punished. In order to enhance the punishment the Committee insists on public sessions, where it is easy to stimulate economic, social and political sanctions against the unfriendly witness, to deprive him of his constitutional rights and to alienate him from the protections of his society. This exposure purpose and the importance of inspiring reprisal movements among its supporters explains the Committee's extraordinary use of field hearings, its collaboration with the press and its lack of legislative output.

In addition to its investigations, the Committee also engages in other ancillary legislative activities such as a

listing of condemned organizations, indices, dossiers and propaganda. The harshness of this exposure system has given rise to the practice of "clearing" the repentant and the blacklisted—a wholly non-legislative function.

Thus, petitioner's exposure hearing was the product of a unique exposure tribunal, an autonomous power system whose entire functioning is unified and explained by its purely non-legislative motivations.

C. In a number of recent cases the petitioners have charged that they were the victims of exposure. However, the Court rejected their claims primarily because there was no affirmative proof of an improper motivation. Here, there was such proof.

This was the first hearing conducted pursuant to a new plan to engage in bigger and better exposure hearings with a view to stimulating community reprisals. The entire record shows how this plan was executed. Petitioner was subpoenaed twice—his first hearing was postponed. Special interviews were given to the local press in two different communities before the subpoenas were issued announcing that they would be issued. The Personnel Manager of a plant in which petitioner's union was faced with an election was able to announce three days before the issuance of the subpoena that a subpoena would be issued. Chairman Walter expressly told a local newspaper that the hearing would demonstrate that petitioner was a "card-carrying Communist" and that "the rest" would be "up to the community." Another newspaper was told that the Committee was interested in breaking petitioner's union, an objective which was reiterated by the Chairman on the floor of Congress.

The subcommittee which presided over petitioner's hearing was informed of the Chairman's announcements and

actions, but did not disavow them. The exposure system thus revealed in the entire record is emphasized by the fact that the Committee had no evidence to warrant the belief that the petitioner was a "card carrying Communist."

D. The Government claims that the Committee had a *bona fide* legislative purpose which was to investigate Communism—generally and in the labor movement. But surely, a more specific legislative objective is required to overcome the strong proof of an exposure motivation. The published record of the hearings indicates that it was merely an investigation of "Communist Activities In The Fort Wayne Area"; this hardly reflects the kind of substantive evil which a court could accept as a shaping and exclusive legislative purpose. Equally unimpressive is the claim advanced at the trial that the hearing had something to do with the Communist Control Act of 1954. Nothing was said about that Act at the hearing; it was merely an afterthought advanced because it had successfully shown the legislative purpose of the *Watkins* proceeding in the court below.

But this hearing succeeded the Communist Control Act by some six months. Investigations under that Act were confided to the Attorney General who filed a petition against the Union on December 20, 1955, which was ultimately dismissed.

The Committee's Annual Report, far from supporting the claim of a *bona fide* legislative purpose, further confirms its absence.

Contrary to the Government's contention, this is not a case which relies on private motivations of Committee members, but on authoritative statements of its Chairman. A presumption of investigative regularity is not irrebuttable, and where, as here, the facts are clear that an exposure objective was present, the presumption falls away.

The Committee, of course, does not proclaim its exposure purpose from the housetops, but what is striking here is that the entire series of actions and pronouncements by the Chairman form a coherent whole which places an unmistakable punitive stamp on the hearing.

It must be borne in mind that the purpose of an investigative hearing can be established in ways more informal than those which are prescribed when a statutory purpose is under scrutiny.

II

If we are correct in our contention that the hearing was called for purposes of exposure, then there can be little doubt that the mere summoning of petitioner was an attainder. It cannot be doubted that exposure is punishment in the attainder sense. It is a judgment handed down without judicial trial that the victim is guilty of subversion. He is punished by the publication of that fact so that a badge of infamy can be attached to him. The exposure system is nourished by the same climate as that in which attainders flourished. It reflects the extent to which popular clamor and hate have forced a breach in the forms of law.

III

The inquiry in this case violated the First Amendment because a purpose to injure was its objective. Petitioner's constitutional rights cannot be subordinated to such purpose.

Moreover, the Committee had no legislative need for the information sought from petitioner, and there was no probable cause to believe that the petitioner had in his possession information which would be helpful to the Committee. In a First Amendment case such an absence of probable cause is fatal to a contempt prosecution.

IV

The trial court erroneously excluded evidence of an interview which Representative Walter gave to the press before he became Chairman, in which he announced his new plan for improving on the past exposure techniques of the Committee. This evidence was excluded by the trial court on the authority of the *Watkins* case below. But this evidence fell outside of the sources of proof of a committee's purpose condemned in the *Watkins* case below, and was manifestly competent and relevant. Its accuracy and authenticity were conceded. Similarly objectionable was the trial court's exclusion of evidence to show that the Labor Relations Director of a plant where petitioner's union was facing a labor representation election knew about the intended issuance of the subpoena before it was served on petitioner.

V

This case requires reversal because petitioner was denied the protections of *Watkins* v. *United States*, 354 U.S. 178, 208-209 requiring an explanation to the witness of the matter under inquiry and the pertinency of specific questions when they are otherwise obscure. Petitioner had excellent ground for believing that the purpose of the Committee as announced by the Chairman was to expose him and to break his union. He had a right to assume that all of the questions asked of him would be pertinent only to these purposes and indeed filed objections with the Committee protesting these announced purposes. His objections thus did not reflect an awareness of a contemplated legitimate subject under inquiry and he had a right to assume that all of the questions would be pertinent to himself and to an attempt to injure him and his union rather than to any other subject.

We think that the motion which petitioner filed at the outset of the hearing "triggered" the Committee's respon-

sibility to set out clearly the claimed subject under inquiry. The Committee evidently thought so too, for it denied the motion at the end of the hearing "*nunc pro tunc.*" But this delayed action could hardly cure the failure of the Committee to conform, at the outset of the hearing or at the time of the refusals to answer, to the requirements of *Watkins.*

VI

The indictment was insufficient in failing to specify the matter under inquiry in which the questions put to petitioner are claimed to be pertinent. We recognize that formal and technical defects cannot invalidate an indictment, but the defect here was basic. The indictment was couched in the general terms of the statute. But these were in no way informative. As the indictment reads, the questions under inquiry might have been on any of the vast number of subjects over which the Committee has ranged through the years.

The indictment did not convey the information needed by the trial court to rule on pertinence and by the petitioner to prepare his defense. It is significant that many related indictments, including some handed down for contempt of the Committee, contain specifications comparable to that lacking here. There is surely no reason why the present indictment should not be held to a similar standard of sufficiency.

The indictment likewise is defective in its failure to allege that the petitioner acted wilfully. The Court ruled in *United States* v. *Quinn,* 349 U.S. 155, 165, that Section 192 requires "a deliberate intention of refusal to answer." Since this intent is an essential ingredient of the offense, it must be alleged in the indictment.

VII

Petitioner was deprived of his right to a fair and impartial grand jury because eleven of the 23 members of the grand jury which voted the indictment against petitioner were at that time employed by the Government. For the sake of brevity and for the convenience of the Court, petitioner relies on Argument I of the brief for petitioner in *Russell* v. *United States*, No. 8, and requests dismissal of the indictment.

ARGUMENT

I. The Committee's Hearing Was an Exercise of the Unconstitutional Power of Exposure.

It is our contention that the hearing which gave rise to the petitioner's contempt citation was called for reasons unrelated to the legislative process. In making this contention, we recognize that the investigative power is a broad one and is not confined to investigations in connection with a specific piece of legislation, proposed or enacted. A Congressional committee may investigate to determine whether a law needs amendment or is being properly enforced. Similarly, investigations may broadly probe the proper expenditure of public funds.

We do not contend that an otherwise proper exertion of the power to investigate is vitiated by the fact that harm to the witness incidentally results from such inquiry. Nor do we challenge the view that the courts must extend hospitality to asserted legislative justifications of the power to investigate. The doctrine of the separation of powers requires this. But this same doctrine also requires that the courts exercise the utmost vigilance in rejecting assertions of legislative power which are poorly disguised usurpations of the law-enforcement function. We submit that this re-

sponsibility is particularly great during such a period of social and political tension as the present when the pressure to injure and punish, to discriminate and harass outruns the established forms of law. The Court has been made familiar with the manner in which, in the area of race relations, punishment frequently masquerades as legislation.[7] A comparable resort to forms of legitimacy has, we submit, cloaked an abuse of the legislative power in the realm of subversion.

A. The Congressional Power of Investigation Must Be Confined to the Limits of the Legislative Process

The Constitution does not in express language give Congress the power to investigate. The power to investigate is an implied power. Thus, the power to investigate must be in aid of the law-making power—not something separate and distinct from it. Our Government is one of limited and unenumerated powers; the totality of the authority of Congress under Article I, Section 1, is but the authority to exercise the "legislative power granted herein."

The Court long ago said of the investigatory power (*Kilbourn* v. *Thompson*, 103 U.S. 168, 191) that, "It will scarcely be contended by the most ardent advocate of this power in that respect that it is unlimited." The exercise of the power must be confined to matters within the constitutional authority of Congress.[8] Like other implied powers, it "is a means to an end and not the end itself" and "rests simply upon the implication that the right has been given

[7] Cf. *N.A.A.C.P.* v. *Patty*, 159 F. Supp. 503, 526 (E.D. Va.), reversed on other grounds, *sub nom.*, *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167.

[8] *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 614; *Reed* v. *County Commissioners of Delaware County*, 277 U.S. 376, 388.

to do that which is essential to the execution of some other and substantive authority expressly conferred." *Marshall* v. *Gordon*, 243 U.S. 521, 541.

In 1927, in *McGrain* v. *Daugherty*, 273 U.S. 135, 173-174, the Court reiterated that the power to investigate is not a "general" one but must be exercised for a legislative purpose:

> "... the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and ... neither House is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied."

In 1929, in *Sinclair* v. *United States*, 279 U.S. 263, 292, the Court repeated the central thesis of the *Kilbourn* case, *supra*, that the individual has "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs," and cited with approval all of its historic rulings protecting personal and private rights. *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 478; *Harriman* v. *Interstate Commerce Commission*, 211 U.S. 407;* *United States*

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* It was concerning this case that Mr. Justice Holmes wrote to Harold J. Laski:

> "The claim of the Interstate Commerce Commission in I.C.C. v. Harriman, 211 U.S. 407, made my blood • • • boil and it made my heart sick to think that they excited no general revolt. The soft period of culture that I spoke of the other day tended to oblivion of the fighting significance of guarantees." *Holmes-Laski Letters*, the Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935, 21.

v. *Louisville & Nashville R. Co.*, 236 U.S. 318, 335; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 305, 306.

The limitation on the power of Congress to conduct investigations was again emphasized by the Court in *Quinn* v. *United States*, 349 U.S. 155, 160-161:

> "There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes (citing Cf. *Anderson* v. *Dunn*, 6 Wheat. 204) or through judicial trial (citing *In re Chapman*, 166 U.S. 661)—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively (citing See *McGrain* v. *Daugherty*, 273 U.S. 135, 175).
>
> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose (Citing *Id.*, at 173-174; *Kilbourn* v. *Thompson*, 103 U.S. 168, 190). Nor does it extend to an area in which Congress is forbidden to legislate (citing Compare *United States* v. *Rumely*, 345 U.S. 41, 46). Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary (citing *Kilbourn* v. *Thompson*, 103 U.S. 168, 192-193). Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the

Fifth Amendment's privilege against self-incrimination which is in issue here."

In *Watkins* v. *United States*, 354 U.S. 178, 187, 200, the Court stated,

"There is no authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible . . . We have no doubt that there is no congressional power to expose for the sake of exposure."

In *Barenblatt* v. *United States*, 360 U.S. 109, 133, the Court repeated:

"Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive."

If, as Chairman Walter announced, the purpose of the hearing was to expose petitioner, to attach an invidious label to him so that the community would work its will on him, it requires no argument that the hearing and, at the very least, petitioner's appearance, resulted from an unconstitutional exercise of power.

B. The Committee's Exposure System

The hearing in this case is but an instance—an unusually revealing one—of a pattern of exposure, which has characterized the Committee's functioning from the beginning.

These are the principal ingredients of the Committee's exposure operation:[10]

1. The Committee openly proclaims that its special, unique function is exposure.

2. The "facts" which the Committee purports to seek are already known to it through countless "area" or subject matter investigations.

3. The Committee's hearings are set in motion not because of a *bona fide* investigative need but only because the names of new, potentially unfriendly, witnesses have become known to it. Without a supply of such names, the Committee would grind to a halt like a locomotive without steam. This hunt for names accounts for the Committee's curious exhaustiveness. *Everyone* suspected by the Committee must be exposed. In some instances, the exposure process has victimized the same individual three or four times. The regular, continuous and recurrent pattern of the Committee's operation is quite different from the discontinuous and *ad hoc* character of conventional legislative investigations. It is a clue to the Committee's true role—that of a law enforcement tribunal which judges and pun-

[10] This necessarily brief summary is based upon petitioners' briefs in the *Emspak*, *Watkins* and *Braden* cases and the *amicus curiae* brief of *Davis, et al.*, submitted in support of the petition for rehearing in *Barenblatt* v. *United States*, *supra*. Much of the material in these briefs is amplified and brought down to date in Donner, *The Un-Americans* (New York, 1961) and *The Congressional Pillory*, The Nation, February 28, 1961.

ishes for present and past (almost invariably these days, the latter) political affiliation of which it disapproves.

The imperatives of the exposure process thus explain the Committee's functional continuity. This continuity of the exposure system is vital to the achievement of the Committee's goals of intimidating dissent and perpetuating itself.

4. Because names are the Committee's life-blood, it inevitably forces the would-be co-operative witness to name others. Witnesses who plead with the Committee to waive the requirement so that they can be "cleared" as friendly are invariably refused even though they promise full disclosure of their own activities. The unwillingness to act as an informer thus forces the witness to refuse to co-operate altogether. This is no great loss to the Committee. The facts which the witness offers to share about his own activities are not important, but the names are vital to the exposure process.

5. More than eighty percent of the "testimony" before the Committee consists of the refusals of witnesses to testify and supporting explanations and pleas. The Committee knows (or can easily find out) whether or not a prospective witness will testify. But the Committee cherishes these witnesses; they are precisely the ones who must be exposed and punished. The compulsory disclosure of the witness' politics is not a means to a disclosure of other facts, but an end in itself. It is a destination, not a journey.

6. In order to ensure the maximum injury to the witness, the Committee invariably requires him to appear at a public session. The Committee uses the executive session primarily for the purpose of determining how best to injure the witness. The fact that the witness has already

testified *in camera* does not save him from a public appearance. The public session facilitates his exposure as well as the exposure of those whom he is required to name.

7. The public exposure hearing operates through a dual process of public identification of the victim and the stimulation of group and individual economic, social and political sanctions against him so that he will be discharged and permanently blacklisted, his career and reputation destroyed, his social and family relationships ruined and his children shunned. The Committee seeks to achieve its purposes by attributing to the witness views and affiliations—political, trade union, organizational—which it equates with such fear-engendering crimes as treason, plotting, espionage and sabotage. In order to guaranty results, the Committee collaborates with those in the community who share its views to inspire in the rest of the community sufficient hatred and fear of the victim to do its bidding. An exposed witness suffers an invasion of his constitutional rights; he is also alienated from the moral and ethical protections of his society.

8. The exposure process is implemented by private groups who collaborate with the Committee by executing its sentences. In furtherance of this collaboration the Committee elicits details about the witness's life, residence, occupation and place of work. Congress has no need for these facts, but they help the bigots in the community, in Chairman Walter's words, "do the rest." The need to ensure that the exposure will "take" also explains the Committee's partiality for on-the-spot hearings ("road shows"). Since 1950, the Committee has held hearings in more than 25 different American cities (and in some of them three or four times). It is for this reason also that the Committee leans so heavily on the press.

9. The Committee on occasion activates its exposure system at the instance of the private individuals and groups who collaborate with it in the exposure process. Employers, patrioteer and ultra-rightest groups can bring the Committee to their communities to expose their enemies.

10. Although the Committee is both a permanent investigating committee and a standing legislative committee, its performance in the latter capacity is significantly unimpressive. In the 16 years of its functioning in its combined capacity, it has rarely held legislative hearings on the bills which have been referred to it. The Committee's scorn for legislative hearings is explained only by the fact that investigative hearings are much more useful as tools in the exposure operation.

11. The investigative hearings themselves have little or no relationship to the legislative recommendations which the Committee makes in its annual reports. These recommendations are not the product of the investigative processes but are glued on, as it were, to its annual reports to give the appearance of legitimacy to its exposure hearings.

12. In order to make effective its exposure activities, the Committee engages in a variety of related, non-legislative operations:

(a) The Committee condemns organizations as subversive without hearings in order to discredit their activities and to supply its collaborators with the raw materials for judging, injuring and blacklisting Americans because of their membership in these organizations. The organizations which fall under its disfavor are collected in a compendium called, "Guide to Subversive Organizations and Publications," which lists

in alphabetical order the disfavored organizations and publications.

(b) The Committee publishes an ever-increasing stream of propaganda which has no relationship to the legislative process but which promotes the fear and hate, so essential to the operation of the exposure system.

(c) The Committee maintains an elaborate system of dossiers. These dossiers are made available to the Committee's supporters, either directly or through their Congressmen, for the purpose of enabling the Committee's supporters or collaborators to maintain surveillance over political suspects and to do them injury with officially sanctioned weapons. The dossiers are supplemented by huge published indices of names.

13. The exposure system not only has its "law side" but it also has its "equity side." The Committee uses its power officially to "clear" witnesses who find themselves unemployable either because they have previously been exposed or are condemned by the Committee's supporters.

14. In developing this exposure operation, the Committee has, in fact, converted itself into a fourth branch of Government, an autonomous, institutionalized power system which is disguised by a pervasive deception. In pre-*Watkins* proceedings (such as this case), the Committee was not overly cautious about concealing its exposure aims. It was only when the case came to court on enforcement of a contempt citation that the Committee invented a legislative justification. Since *Watkins*, the Committee has perfected an elaborate series of justifications on the hearing level: a "canned" ritualistic recital of legislative purpose, a "box-score" of legislative recommendations and an "Omni-

bus" anti-subversive bill on which it cannot act because it lacks jurisdiction.

We submit that this pattern of exposure and deception as mirrored in the Committee's hearings and reports for more than a generation is important in evaluating the Committee's purpose here. The Committee is marked by a unique institutional homogeneity and continuity. It has exercised its power in the same fashion throughout its history. In 1949 it informed Congress that (R. 179) "its work is part of an 11-year continuity of effort that began with the establishment of a Special Committee on Un-American Activities in August 1938. The Committee would also like to recall that at no time in those eleven years has it ever wavered from a relentless pursuit and exposure of the Communist Fifth column."

In 1951 it repeated (R. 182), "the House Committee on Un-American Activities was started on its way May 20, 1938, with instructions from the United States House of Representatives to expose people and organizations attempting to destroy this country. That is still its job, and to that job it sticks."

In 1954, chairman-to-be Francis E. Walter announced (*supra*) the Committee's "new plan for driving Reds out of important industries" by holding bigger and better exposure hearings. The novelty of the plan was that the "public [was to be] urged as well as invited to attend" so that the "full glare of publicity" would enable "loyal Americans" to "do the rest of the job." [11]

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[11] Mr. Walter could hardly have thought that this "new plan" had a legislative significance. On August 26, 1955, he observed, "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware if possible of the extent of the infiltration of Communism in all phases of our society." U.S. News and World Report, August 26, 1955, p. 71, quoted in Judge Edgerton's dissenting opinion in

The Committee's activities through the years cannot be viewed as a disconnected series of hearings, publications, indices, press releases, each unrelated to the other. The entire life of the Committee is institutionally unified and explained by its dominant exposure purpose and techniques, refined and rationalized with the passage of time. Under these circumstances, the Court cannot blind itself to the Committee's past activities. And this is especially so because this exposure pattern finds extraordinary confirmation in the record here.[12]

C. Petitioner Was Called for the Express Purpose of Exposing Him

Within recent years, the Court has decided five cases in which an improper Committee purpose or objective was asserted as a defense to a contempt citation and punishment. *Quinn* v. *United States, supra; Watkins* v. *United States, supra; Barenblatt* v. *United States, supra; Wilkinson* v. *United States,* 365 U.S. 399; *Braden* v. *United States,* 365 U.S. 431. In all of these cases the argument of improper purpose was based primarily on inferences drawn from a claimed lack of a legitimate legislative purpose. In those cases in which the Court rejected the claim of lack of legislative purpose (*Barenblatt, Braden* and *Wilkinson*) it automatically disposed of the exposure contention. The basic

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Watkins v. *United States,* 233 F.2d, 681, 693 (App. D.C.). The Committee *knows* that its exposure objectives cannot be validly achieved through legislation (R. 190-191; *Barsky* v. *United States,* 167 F.2d 241, 256 (App. D.C., dissenting opinion). For the Committee's most recent pronouncement on the exposure problem, see its *Annual Report* for 1960, p. 137.

[12] As the dissenting opinion pointed out in *Watkins, supra* (at p. 692), "Words and conduct of the Committee on other occasions go far to confirm the inference that its purpose on this occasion was exposure . . . Although general propositions do not decide concrete cases, they help to decide them."

lapse in the proof was, we think, that there was no showing that the Committee had affirmatively "assumed a power which could only be properly exercised by another branch of government, because it was in its nature clearly judicial." *Kilbourn* v. *Thompson*, 103 U.S. 168, 192 (quoted in *Barenblatt* v. *United States*, *supra*, at p. 133).

In this case, the Committee through its Chairman, undertook to judge petitioner as a person and to spur the community to punish him. The exposure purpose was explicit and unequivocal. It is based not on inference but on fact.

The following circumstances, we submit, establish beyond question the exposure purposes of the hearings:

(a) This was the first hearing conducted pursuant to a statement of policy made to the press (*supra*) that the Committee would operate under a "new plan" under which known or suspected subversives would be given "a chance in the full glare of publicity" to deny charges against them or "to take shelter behind constitutional amendments," so that they could be "exposed before their neighbors and fellow workers" with a view to insuring that "loyal Americans who work with them will do the rest of the job." The purpose of these hearings, Representative Walters explained, would be "to demonstrate that [the witnesses] are part of a foreign conspiracy" (*supra*, pp. 6, 7).

(b) On two separate occasions, even before the subpoena to testify was issued, special interviews were given to the local press in two different communities where the witness's Union was facing representation elections, announcing that the subpoenas would be issued (*supra*, pp. 7-9).

(c) The personnel manager of one plant in which a union representation election was scheduled announced

three days before the subpoena was actually issued that petitioner would be subpoenaed—the same personnel manager who on an earlier occasion had obtained access to petitioner's dossier from the Committee's private files. (*supra*, p. 8).

(d) In one interview given to the local press before the issuance of the subpoena, Chairman Walter stated that the Committee intended to show that the petitioner and another witness connected with the Union were "card carrying Communists" and that "the rest is up to the community" (*supra*, p. 9).

(d)(e) Another newspaper was told, through its Washington correspondent, that the Committee was interested in breaking the union of which the witness was a leader because its continued existence was not good for the country. The substance of this objective was repeated by the Chairman on the floor of Congress. (*supra*, p. 8).

(f) When the Chairman's exposure campaign was complained of at the hearing by motion, the sub-committee made no effort to deny the facts or disavow that its objective was exposure (*supra*, p. 9).

(g) The Committee had no probable cause to believe that petitioner would supply it with information. Despite Chairman Walter's announced intention to demonstrate that the witness was a "card carrying Communist," no evidence was adduced at the hearing or the trial to this effect. Mr. Tavenner's testimony at the trial shows only that the Committee called the witness because he was an officer of the Union, but no testimony was offered that the Committee had evidence that he had been accused of Communism (*supra*, pp. 14, 15).

If, as the Court ruled in *Barenblatt* (360 U.S. at 112), the "power [of investigation] and the right of resistance to it are to be judged in the concrete and not on the basis of abstractions," the conviction here must be reversed.

D. The Government's Contentions

1. *The Claimed Bona Fide Legislative Purpose.*

The Government urges that a *bona fide* legislative purpose prompted the hearings and that the evidence we have recited of an invalid purpose merely shows "motive."

The entire record is consistent with the contention that the inquiry was conducted for a non-legislative purpose. At the commencement of the hearing at which petitioner testified, the sub-committee chairman stated (R. 60):

> "There will be considered at this hearing testimony relating to Communist Party activities within the field of labor, the methods used by the Communist Party to infiltrate labor organizations, and the dissemination of Communist Party propaganda.
>
> • • •
>
> "In the course of the investigation conducted by this committee at Dayton in September, 1954, information was obtained indicating that one or more of the witnesses to be heard today should have firsthand knowledge of Communist Party activities in the area of Dayton and elsewhere."

The Dayton hearings, a run-of-the-mine exposure proceeding entitled, "Investigation of Communist Activities in the Dayton, Ohio area," was held in Dayton on September 13-15, 1954, and were presided over by Ohio's Representa-

tive Scherer.[13] The hearings explored a melange of subjects ranging from labor to education and dredged up hundreds of names for the Committee's exposure mill. But the Committee's haul did not include petitioner.

The sole reference to petitioner in the proceedings appears in the following colloquy (Dayton Hearings, Part 2, p. 6900):

> "Mr. Clardy [of Michigan]. Do you know a man by the name of Gojack? Do you know him?
>
> "Mr. DeLacy. Yes.
>
> "Mr. Clardy. You know he is at the moment participating in the Square D strike in Detroit?
>
> "Mr. DeLacy. I understand the whole UAW has joined in the picket line.
>
> "Mr. Clardy. I am asking you a very simple question.
>
> "Mr. DeLacy. I don't know where he is.
>
> "Mr. Clardy. You haven't been in contact with him?
>
> "Mr. DeLacy. Not recently.
>
> "Mr. Clardy. Have you any idea whether Mr. Gojack is a member of the Communist Party?
>
> "Mr. DeLacy. None whatsoever."

The Committee in the Dayton hearings thus had not obtained information that petitioner had "firsthand knowledge of Communist Party activities." Petitioner's hearing was a dragnet inquiry into Communism. We submit that such an "investigation" was merely a manhunt. The legislative purpose reduces itself to an unparticularized probe of communism generally and in the labor movement. Such a vague theme, divorced from a claimed concern with a

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[13] A fourth final session was held in Washington, D. C. in November, 1954. See *Russell* v. *United States*, No. 8, this Term.

specific substantive evil, cannot serve to validate an inquiry whose only other announced purpose is exposure. The published report of the hearings (GE 7) which bears the official title "Investigation of Communist Activities in the Fort Wayne, Ind., Area," likewise supplies no indication of a legislative purpose to which, it might be claimed, the exposure objective was merely ancillary.

At the trial the prosecution did not offer even an hypothesis to link the inquiry or the *ad hoc* questions to a legislative purpose. It seems fair to say that the basic theory relied upon by the government is that an inquiry into Communism is self-justifying and that a committee of Congress needs no legislative justification for exposing suspected Communist individuals or organizations (R. 25-37, 40-50).

The prosecution further urged at the trial that the Communist Control Act of 1954 which had been relied on to support the legislative purpose of the *Watkins* proceeding, also supplied a legislative purpose to this proceeding (R. 18-19).

But this is plainly an afterthought. The Committee never told petitioner that it was concerned with this statute when he challenged the purpose of the hearing. Besides, the *Watkins* hearings antedate the August 1954 passage of the Communist Control Act, while these hearings followed the passage of the Act.

A vague speculation that the Committee could have concerned itself with exploring the enforcement of or possible amendments to the Communist Control Act does not, we submit, neutralize the solid evidence of the purpose to expose.

By the terms of the Communist Control Act of 1954, Congress delegated to the Attorney General the task of investigating unions and of proceeding before the Subversive Activities Control Board against those alleged to

be dominated or infiltrated by Communists.[14] If the Union's leadership made it a threat to security, the investigative resources of the Attorney General were available to

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[14] The portion of the Communist Control Act referred to in the text has been added to the Internal Security Act of 1950, 50 U.S.C. 781 ff., as amended, as Section 134. It reads in relevant part as follows:

"(a) Whenever the Attorney General has reason to believe that any organization is a Communist-infiltrated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

"(b) Any organization which has been determined under this section to be a Communist-infiltrated organization may, within six months after such determination, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-infiltrated organization.

"(c) Each such petition shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice.

"(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section, except that upon the failure of any organization named as a party in any petition filed by or duly served upon it pursuant to this section to appear at any hearing upon such petition, the Board may conduct such hearing in the absence of such organization and may enter such order under this section as the Board shall determine to be warranted by evidence presented at such hearing.

"(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more

bring it to book.[14] The Committee needed the information not to guide Congress in the discharge of its legislative re-

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individuals who are, or within two years have been (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof;

(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been used to further or provide the objectives of any such Communist organization, government, or movement;

(4) to what extent, if any, such organization within three years has received from or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with any such Communist organization, government or movement;

(6) to what extent, if any, the affiliation of such organization, or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

(7) to what extent, if any, such organization or any of its members or manager are, or within three years have been, knowingly engaged—

(A) in any conduct punishable under section 4 or 15 of this Act or under chapter 37, 105, or 115 of title 18 of the United States Code; or

(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support required by its armed forces, in any activity resulting in or contributing to any such impairment."

[14] Indeed, a petition was filed against the Union under the statute on December 20, 1955. After a lengthy hearing the Department of Justice moved to dismiss because it was unable to establish the

sponsibilities, but only to enable it more effectively to accomplish its punitive purpose.

It is hardly surprising that the Committee made no recommendations in the area of its claimed legislative concern. It recommended instead legislation concerning wiretapping, requirement of affidavits from Government contractors, revision in the statute of limitations on treason, espionage and title 18, section 1001 violations, and, finally, a streamlined procedure for punishment for contempt of Congress (R. 134-135). Obviously, none of the information sought from petitioner in the hearing had any bearing whatever on any of these legislative proposals.

In summing up its work for the past year in its Annual Report, the Committee stated (R. 129-130):

> "Documented proof that a Communist-dominated union siphons off workers' dues for Communist purposes was produced in the course of committee investigations and hearings on District 9 of the United Electrical, Radio and Machine Workers of America. UE District 9 supervises union locals in Indiana and Michigan from headquarters in Fort Wayne, Ind. These hearings were printed under the title, 'Fort Wayne, Ind., Area.'"

It should be noted, first, that the Communist Control Act adequately dealt with this problem. But of even greater significance is the fact that in its questioning of petitioner, who was called to testify precisely because he was an officer of District 9, no questions were asked concerning the use of union dues for Communist purposes.

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allegations of the petition and the Subversive Activities Control Board dismissed the petition on March 30, 1959. See *Rogers* v. *United Electrical, Radio and Machine Workers of America*, Docket No. 119-56, Subversive Activities Control Board.

The Annual Report goes on to state (R. 130):

"In the course of the past year, this committee prepared and printed a cumulative index to all hearings and reports of the committee from its inception in 1938 through 1954. Whereas earlier cumulative indexes issued by the committee were confined to the names of individuals, the new index for the first time contains not only individuals but also organizations and publications mentioned in hearings and reports from 1938 through 1954.

"This mammoth project was undertaken in the belief that it would be of inestimable assistance to the work of the committee's staff, the Congress, and the various Federal, State, and municipal agencies concerned with the problem of the Communist conspiracy. The reception which the new index has already received completely justifies the undertaking. The committee would like to call attention to the warning, clearly carried in the index, that the mere listing of any person, publication, or organization in the index constitutes no evidence of derogatory information in committee hearings and reports. Anti-Communists as well as Communist individuals and organizations are frequently mentioned in committee publications and both have been listed in accordance with customary indexing procedures.

"Members of Congress have continued to call upon the committee for information on subversive activities. The reference section answered more than 1,300 requests submitted by individual members of Congress during the past year, in addition to its services for the committee staff and various agencies of the executive branch of the Government. To supply these services, the committee maintains comprehensive information

files dating back many years and constantly growing in volume and value."

Indeed, the record fully documents the manner in which the Committee files concerning petitioner were placed at the disposal of employers for anti-labor purposes (R. 151-154, 157-160). But this is hardly a *legislative* purpose. The achievements in which the Committee takes pride in its annual reports may well reflect the effectiveness with which it executes its self-assigned function of exposure, but, by the same token, they confirm the fact that the Committee itself construes its basic resolution to authorize exposure as an activity independent of legislative investigation.

The fact that the Committee conceivably had a *bona fide* purpose can not save petitioner's conviction if an accompanying and co-equal purpose was exposure. All of the questions which he refused to answer are directly related to the purpose to expose. The fact that they could have been asked in pursuance of a valid purpose hardly establishes that they were. The Court cannot now speculate as to whether they would have been asked in the course of a legitimate hearing.

Moreover, when the Committee undertook to expose petitioner, it was acting wholly outside of its competence. The entire inquiry was tainted. As Judge Keech pointed out in *United States* v. *Icardi*, 140 F. Supp. 383, 388—a case which bears a close resemblance to this one—"If the committee is not pursuing a *bona fide* legislative purpose when it secures the testimony of any witness, it is not acting as a 'competent tribunal' even though that very testimony is relevant to a matter that could be the subject of a valid legislative investigation."

2. *The Contention Concerning Motive.*

In its Opposition (p. 10) the Government argues that "even if it be assumed, contrary to this record, that exposure for its own sake was a private motive of certain individual members of the Committee, their 'motives alone would not vitiate an investigation' if a legislative purpose of the House of Representatives 'is being served.' *Watkins* v. *United States*, *supra*, 354 U.S. at 200. And see *Barenblatt* v. *United States*, *supra*, 360 U.S. at 132."

But, we do not argue here that the personal motives of one or more Committee members, or their animosity toward petitioner, vitiated the inquiry. Our contention is that the objective of the hearing itself was to do him injury. This distinction can be illuminated by the by-play in the record about petitioner's role in the Square D strike (Hearings, p. 105; *supra*, p. 38). If we had contended that Congressman Clardy of Michigan had persuaded the Committee, before he left the Congress in 1954, to use its powers against petitioner because he had participated in the Square D strike, that fact, even if true, would not invalidate an otherwise valid inquiry. But the evidence here is that the publicly expressed reason for calling petitioner was exposure. We are simply not dealing "with a private motive of certain individual members of the Committee."

As we read the *Watkins* and *Barenblatt* cases, they ruled in effect that proof of an improper exposure purpose is a question of fact. Such proof is inadequate to overcome the presumption of investigative regularity when it is confined to an inference based upon private or personal motivations. But when the facts are clear that an exposure objective was present, the presumption falls away.

Here, the exposure purpose was stated and publicly emphasized by the *Chairman* of the Committee and never

disavowed by members of the sub-committee when it was brought to their notice by petitioner's motion. It must be recognized that there is a clear difference between the modes of establishing statutory purpose and intent and investigative intent. The technical stages in the passage of legislation—Committee reports, floor speeches, committee conferences and the like—are formal well-established steps in the legislative process which a court retraces in determining legislative intent. But the purpose of an investigation, the reasons why it was called into being, must frequently be ascertained through more "informal" sources since the investigations are activated in highly informal ways. A subpoena, a letter, a telephone call can overcome the investigative inertia and initiate an investigation.

Surely no more authoritative source of the purpose of a hearing can be found than the Chairman's publicly announced statement of its purpose. The Chairman is the recognized spokesman of the Congressional committee. Under the Committee Rules, for example, he alone has responsibility for issuing subpoenas and launching preliminary inquiries (GE 4; R. 150). The sub-committee which conducted the hearing was appointed by the Chairman (R. 60). Chairman Walter regards himself as this Committee's responsible spokesman. See, for example, Petition for Certiorari (p. 12) and record (pp. 145-154) in *Yellin* v. *United States*, No. 154, Misc. this Term, certiorari granted, October 9, 1961. Nor may the Chairman's publicly expressed intent be discounted as incidental or peripheral. Everything that Mr. Walter said or did, the entire series of pronouncements and actions, forms a unified and coherent whole which stamps its impress on the hearing.

The Chairman of the Committee, exclusively entrusted with the power to issue subpoenas, notifies the local press—not once but twice—that a subpoena will issue; he calls a

hearing on the Union's request for an adjournment further to make clear his desire to break the Union. He tells a local newspaper—the quotation is directly attributed to him and its accuracy is undisputed—that "We intend to bring out the facts that they are card carrying Communists. The rest is up to the community."

If the Court's strictures against investigative exposure for exposure's sake are not to be reduced to an empty verbalism, then the ruling below that this was not an exposure hearing cannot stand. The Court cannot thus lightly permit circumvention of the Constitution.[16] If petitioner's showing in this case falls short of what is required, then we doubt whether an exposure purpose can be shown in any case, or indeed whether the purpose of the Committee can be viewed as a question of fact at all.

II. The Hearing Was a Proceeding to Attaint Petitioner.

If we are correct in our contention that the hearing to which petitioner was called was based upon a purpose to expose him, then there can be little doubt that the entire proceeding gave rise to a bill of attainder. *United States* v. *Lovett*, 328 U.S. 48.

Quite apart from the purpose to turn the petitioner over to the community for reprisal, the exposure of an individual is a "burden" in the bill of attainder sense.[17] In its essence it is a judgment handed down without judicial trial that the witness is guilty of subversion. The punishment is the publication of that fact so that a badge of infamy may be attached to the victim.

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[16] Compare *Gomillion* v. *Lightfoot*, 364 U.S. 339.

[17] See *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277; Note, *Punishment: Its Meaning in Relation to Separation of Powers and Substantive Constitutional Restrictions* And Its Use In the *Lovett*, *Trop*, *Perez* and *Speiser* Cases, 34 Indiana Law J. 231, 234-249.

As Irving Brant has written of investigative exposure:

> "... By smiting a man day after day with slanderous words, by taking away his opportunity to earn a living, you can drain the blood from his veins without even scratching his skin.
>
> "Today's bill of attainder is broader than the classic form, and not so tall and sharp. There is mental in place of physical torture, and confiscation of tomorrow's bread and butter instead of yesterday's land and gold." [18]

The Court is familiar with the history of attainders[19] and no purpose would be served here in retracing it. What does require emphasis is the extraordinary similarity between the contemporary social and political climate against minorities and the seventeenth century religious and political climate of passion and fear in which attainders flourished. The climate of that time created pressures to punish unpopular minorities without resort to the established forms of law. Attainder was used to strike at its victims because no other legal way could be found to do so. The number of suspects were too great, the evidence inadequate, the legally-prescribed punishment not severe enough. Attainder was an instrument of a legislature in the grip of hate and prejudice, impatient with the forms of law.[20]

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[18] Quoted in Mr. Justice Douglas' dissent in *Flemming* v. *Nestor*, 363 U.S. 603, 629.

[19] See, for example, Mr. Justice Black's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 142.

[20] The Earl of Strafford was attainted of high treason "to Husband time" and to "obviate those Scruples and Delays, which through disuse of proceedings of this nature, might have risen in the manner and way of proceedings." Rushworth, *Strafford's Trial*, pp. 676-677.

As Mr. Brant has written (op. cit., *supra*):

> "What is perfectly clear is that hate, fear and prejudice play the same role today, in the destruction of human rights in America that they did in England when a frenzied mob of lords, judges, bishops and shoemakers turned the Titus Oakes blacklist into a hangman's record. Hate, jealousy and spite continue to fill the legislative attainder lists just as they did in the Irish Parliament of ex-King James."

We submit that exposure, too, is a grave and frightening reflection of the breakdown in legal protections which results when the legislature—or its agencies—puts itself at the service of hysteria. Popular clamor against the "subversive" inspired the exposure process. Its persistence and growth during the past generation threatens to perpetuate and freeze it into a permanent institution which cannot be squared with our Constitution.

In *Flemming* v. *Nestor*, *supra*, at p. 48, the Court observed that in the *Test Oath* cases, "the finding of punitive intent drew heavily on the Court's first-hand acquaintance with the events and mood of the then recent Civil War, and 'the fierce passions which that struggle aroused.'" In our own time, too, fierce passions of which this Court undeniably has first-hand knowledge have driven the legislature into the realm of attainder, to "reach the person, not the calling."

III. The Inquiry Violated the First Amendment.

Since, as we have seen, petitioner was not called for a legislative purpose, the compulsory disclosure of his political views and affiliations cannot be balanced against the need to preserve our security. Injury, not security was the purpose of the interrogation and manifestly such an objective constitutes no legitimate public interest to which petitioner's rights must be subordinated.

Quite apart from the impact of the exposure purpose on the First Amendment issue, the questions improperly invaded petitioner's First Amendment rights.

We think that a Congressional committee must limit the exercise of its investigative power to its needs when it invades the First Amendment area. The Committee already had detailed information in its files about petitioner (*supra*, p. 15) and petitioner, for the five years prior to the date of his appearance had filed non-Communist affidavits pursuant to the Taft-Hartley Act (R. 67, 92-93). See *American Communications Association* v. *Douds*, 339 U.S. 382.

Nor did the Committee have reason to believe that the affidavits were false. This lack of "probable cause" further confirms the exposure purpose of the hearing and eliminates a prerequisite to a permitted invasion of petitioner's rights under the First Amendment. The Court has ruled that when rights under the First Amendment are threatened, the appearance of a witness before a Congressional committee may not be required pursuant to "indiscriminate dragnet procedures, lacking probable cause for belief that he possessed information that might be helpful" to the Committee. *Barenblatt* v. *United States*, *supra*, 360 U.S. at 134. But this proceeding did result from a dragnet

operation through which the entire leadership of the Union was to be systematically subpoenaed (*supra*, p. 14). Moreover, the Committee had no information linking petitioner with the Communist Party (*supra*, p. 14). The Committee did have information linking petitioner with the American Peace Crusade some four years prior to his interrogation (R. 41). But, we submit, no contention can be made that this organization threatens our security. No justification can therefore be found for subordinating petitioner's rights of freedom of association.

As the Court pointed out in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 462:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized *the vital relationship between freedom to associate and privacy in one's associations.* When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds*, *supra*, [339 U.S. 382] at 402: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. *Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*" (Emphasis added.)

Finally, even if a legitimate legislative purpose should be deemed to have been present in this case, the Court, we respectfully submit, must re-examine its ruling in *Barenblatt* v. *United States, supra*, which withholds First Amendment protections from compulsory disclosure of present or former Communist Party membership. The Court has seemingly committed itself to the view that our country is under a permanent threat of internal subversion of such menacing proportions as to require the curtailment of our freedoms for the indefinite future. This disturbing conclusion threatens a crisis in our democratic freedoms.

Nor can it be said that the compulsory disclosure device here in issue is an insignificant or minor rupture in the fabric of our freedoms. The matrix of our entire system for protesting dissent is embedded in the anonymity which an impersonal urbanized culture has made possible. The individual's right to dissent was but an abstraction in a pre-industrialized culture when each man was at the mercy of his neighbor's prejudices.[21] The goal of the Committee's exposure system—and its rapidly spreading counterparts[22]—is nothing more or less than the restoration of the social and economic controls which gave dissent no quarter.

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[21] As John P. Roche put it in "American Liberty: An Examination of the 'Tradition' of Freedom," *Aspects of Liberty*, Konvitz and Rossiter (eds.) (Cornell University Press, 1958), "In a very real sense the very impersonalization of urban life is a condition of freedom; it is quite possible to live differently and believe differently from one's neighbors without their knowing, much less caring, about the deviation." See Nye, *Fettered Freedom* (Michigan State College Press, 1959) for an account of liberty in America in the pre-industrial era.

[22] *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *Bates* v. *Little Rock*, 361 U.S. 516; *Uphaus* v. *Wyman*, 360 U.S. 72; *Talley* v. *California*, 362 U.S. 60. See also the *amicus curiae* brief filed in the last cited case for a review of the emerging pattern of disclosure requirements.

It is by now frighteningly clear that the exposure system will, in a time of political and social failure, serve as the instrument of despotism. But the Court should not wait until the Committee organizes lynch mobs. It is enough that today dissenters, as rarely before in our history, feel themselves too menaced by their environment to breast the tides of conformity and repression.

IV. The Trial Court Erroneously Excluded Relevant and Material Evidence.

As part of its proof that the hearing was called for exposure purposes petitioner offered into evidence a newspaper account of an interview with Representative Walter, held on November 19, 1954, shortly before he assumed the Chairmanship of the Committee (R. 193-194, 214, D.E. 9, 9-A *id.*). This account was offered together with related material as Defendant's Exhibit 9 for identification (R. 192-193). The Prosecutor objected (R. 193) not "on the best evidence rule, or lack of authenticity and I do not object on these grounds. I do object that these are immaterial and irrelevant under the *Watkins* decision." [23]

The trial judge then rejected (R. 193) the proferred material, on the authority of the following language in the *Watkins* decision below, that:

> "[A valid legislative] purpose cannot be solved by generalities culled from speeches, many of them no doubt partially extemporaneous, or from partisan assailants, critics, friends or defenders of some projects or cause." [24]

[23] The Government had agreed earlier (R. 169) that there was no issue as to the "accuracy or authenticity" of a large group of documents offered by petitioner to show a lack of legislative purpose.

[24] 233 F.2d at 687.

Petitioner then reoffered Representative Walter's newspaper interview separately and pointed out (R. 194) that Representative Walter's announcement fell outside of the range of material condemned by the lower court in the *Watkins* case as inadequate to establish lack of a legislative purpose. "It seems," petitioner argued, " . . . to be a reasonably thought-out statement of purpose and objective which was followed through, to hold hearings in a community, expose people before their neighbors and fellow workers. 'And I have every confidence that the loyal Americans who worked with them will do the rest of the job.' As a matter of fact, we have already a similar statement in the record with reference directly to Mr. Gojack" (R. 194).

The trial court reiterated its earlier exclusionary ruling (R. 194). This ruling was error.[25] The Goverment contended at the trial that "the question of exposure and lack of legislative purpose . . . is not a proper matter for the reception of evidence" (R. 163). But this cannot be the law for it would render nugatory the Court's ruling in the *Watkins* case, *supra*, barring exposure for exposure's sake as an investigative objective. If the Committee cannot use its power for the specific purpose of exposing a witness, then the witness must have the right to demonstrate such an abuse of power in a courtroom. Indeed, the trial court, itself, did not adopt the Goverment's view in this respect. The fact that the subcommittee did not formally refer to exposure but announced another purpose merely creates a conflict of fact which the courts must resolve. Compare *United States* v. *Tobin*, 195 Fed. Supp. 588 (D.C.D.C.); cf. *Sinclair* v. *United States*, 279 U.S. 263, 295. It may be that a presumption protects the officially-stated purpose but such a presumption, like any other, may

[25] The trial court similarly erroneously excluded other evidence offered to show the Committee's exposure purpose (R. 184-191).

be rebutted. "A legitimate legislative purpose will be presumed when the general subject of investigation is one concerning which Congress can legislate . . . but any presumption in a criminal case can be controverted by adequate evidence to the contrary." *United States* v. *Cross*, 170 Fed. Supp. 303, 308-309 (D.C.D.C.). See also *United States* v. *Icardi*, *supra*.

We submit further that statements of a Committee member about the future Committee program on his assumption of the Chairmanship are competent to establish the purpose of the first Committee hearing which took place after he became Chairman. This interview was not, to use the language of the *Watkins* decision below, *supra*, a statement "from partisan assailants, critics, friends or defenders of some project or cause." This was an interview not with a mere member of the Committee, not with a staff member, not with its counsel but with an authoritative representative, its Chairman-to-be. If he could not speak with authority on the future program of the Committee, who could?

Moreover, the statement is undeniably relevant and material to an evaluation of the Committee's purpose. It was, as we have seen (*supra*, p. 6), given out as the Committee's plan of action prior to the instant hearing. Indeed, this was the very first hearing called after the policy was announced. The record shows how closely the new policy was followed. The new policy contemplated that the public would be urged (not merely invited) to participate in the exposure process. To this end the Chairman notified the local press on two separate occasions of the proposed issuance of the subpoena—even before it was served (*supra*, pp. 7-9). And, as petitioner's counsel pointed out at the trial (*supra*, p. 15), the incitation of community reprisal against petitioner (*supra*, p. 15) followed with deadly accuracy the announced tactic of the "new plan."

As we have pointed out (*supra*, pp. 46-47), the very nature of investigative hearings precludes a rigid or formal canon for evaluating purpose. The lower court's decision in *Watkins* noted (233 F. 2d at 687) that, "We must judge each inquiry in its own setting and upon its own facts." The Walter interview in issue here was rejected in *Watkins*. But it was given in November, 1954, some eight months *after* the Committee hearing in which Watkins testified (233 F. 2d at 684) not, as here, shortly before. The trial court, we submit, mechanically followed the ruling in the *Watkins* case without considering the proferred evidence "in its own setting and on its own facts."

The trial court also barred an attempt to show (R. 160) that Labor Relations Director McClaren was aware of the fact that petitioner would be subpoenaed some three days before he in fact was subpoenaed and that he announced this impending event to the employees at the Magnavox plant where a collective bargaining election was pending. We think that petitioner should have been allowed to demonstrate this. We submit that it was highly relevant to proof of an exposure purpose. Petitioner had made this charge to the Committee in a telegram which was admitted into the record and relied on by the Government and the court below (R. 222-223) to show how intemperately petitioner behaved. But he should have been permitted to adduce evidence to show that his protest was grounded in his outrage over the Committee's blatant abuse of power.

V. Petitioner Was Not Advised of the Subject Under Inquiry or the Pertinency of the Individual Questions.

The court below rejected our contention that petitioner was denied an explanation of the matter under inquiry and the pertinency of the questions thereto as required by *Watkins* v. *United States*, 354 U.S. 178, 208-209, 214-215. See also *Scull* v. *Virginia*, 359 U.S. 352, 353. The court ruled (R. 231) that "nowhere does it appear that appellant was without knowledge of the real purpose of the hearing or the pertinency of the question". The court below rested its conclusion on the claim that the announcement by the sub-committee chairman of the purposes of the hearing clearly communicated the subject matter of the hearing to petitioner (R. 231). But there is no showing at all in the record that petitioner was present when the announcement was made. It is true his counsel was also counsel for the first witness, but we think that the *Watkins* rule requires that the subject matter of the hearing and its pertinency be communicated to the witness and not to his counsel.

The court ruled that, as in the *Barenblatt* case, petitioner's objections to the jurisdiction of the Committee showed that he was aware of the Committee's purpose to question him as it did. But such a conclusion is quite unfounded. The objections assumed that the purpose of the Committee would follow the lines of the Chairman's announcement: to expose petitioner and to break the Union. Under these circumstances it could hardly be said that the objections reflected an awareness of a contemplated subject under inquiry. In such an "inquiry" all questions are pertinent if only they are sufficiently embarrassing, if only they serve to harass and expose the witness and his associates. But "pertinent" means "pertinent to a subject matter properly under inquiry, not generally pertinent to

the person under interrogation." *Rumely* v. *United States*, 197 F.2d 166, 177 (App. D.C.); *United States* v. *Orman*, 207 F.2d 148, 153 (C.A. 3).

It is equally fallacious to argue, as the court below did, that the objections filed by petitioner cannot be viewed as imposing a requirement on the Committee to explain the subject under inquiry and the "connective reasoning whereby the precise questions asked relate to it". See *Watkins* v. *United States*, *supra*.

The objections filed by petitioner obviously constituted an objection to all of the questions which might be asked on the ground that they were pertinent only to an illegal subject matter, namely, the exposure of himself and his union. Under these circumstances, it seems to us that the Committee was obliged to make clear to petitioner, both the nature of the subject matter under inquiry and the connective reasoning which made the questions pertinent. The Committee itself thought that petitioner's objections called for some response from it when they were filed. Although the Committee remained silent until all the questions had been asked which were in issue here, it ultimately dismissed the objections "*nunc pro tunc*" (*supra*, p. 11). Obviously this retroactive rejection was inadequate to give petitioner notice either at the time his objections were filed or when the questions in issue were asked that the Committee thought the purpose of the inquiry—a proper legislative purpose—had been adequately communicated to him.

VI. The Indictment Was Insufficient.

The indictment (R. 1) alleges only that in his appearance before the Committee petitioner was asked "questions which were pertinent to the question then under inquiry" and that he "unlawfully refused to answer those pertinent questions". These allegations are insufficient.

A. The Failure to Specify the Matter Under Inquiry to Which the Questions Put to Petitioner Are Said to Be Pertinent

The allegation that the questions put to petitioner were pertinent "to the question then under inquiry", without any description of the latter, is meaningless, and fails to satisfy the well-organized requirement that an indictment under 2 U.S.C. 192 must plead pertinency as an essential element of the offense. *Sinclair* v. *United States, supra.* The Court in *Watkins* v. *United States, supra,* ruled that the elucidation of pertinency to the witness at the hearing is an indispensable due process requirement. We think the same reasoning applies to an indictment under the contempt statute.

We recognize that indictments are to be scrutinized for their genuinely informative qualities, and not for formal and technical defects. The lack of a formal allegation may not be fatal if its substance sufficiently appears from the facts alleged. *Hagner* v. *United States,* 285 U.S. 427; *Gariepy* v. *United States,* 189 F.2d 459 (C.A. 6). The indictment against petitioner contains the formal charge that the questions were pertinent, but the presence or absence of the naked allegation is not the test. The indictment might be upheld without it, if the other allegations adequately described the question under inquiry so that the facts bearing on pertinence sufficiently appeared. *United States* v.

Fields, 6 F.R.D. 203 (D.C.D.C.). But the allegation alone, without the facts, is insufficient *Rolland* v. *United States*, 200 F.2d 678 (C.A. 5); *Sutton* v. *United States*, 157 F.2d 661 (C.A. 5); *Lowenburg* v. *United States*, 156 F.2d 22 (C.A. 10). "We recognize the general rule that an indictment is insufficient if it states conclusions rather than the facts upon which the conclusions are based." *Butzman* v. *United States*, 205 F.2d 343, 348 (C.A. 6), cert. denied 346 U.S. 828. Under that principle, petitioner's indictment is plainly insufficient.

When the statute under which a defendant is indicted describes in specific terms all the elements of the offense, an indictment in the language of the statute may be sufficient without more. But when the statute is couched in general terms, as is the case here, mere repetition of statutory language is not enough; the indictment must allege the facts with particularity. *United States* v. *Carll*, 105 U.S. 611; *Frankfort Distilleries* v. *United States*, 144 F.2d 824 (C.A. 10), rev'd on other grounds 324 U.S. 293.[26]

The statute under which petitioner's indictment is laid is "in generic terms" as it is intended for application to congressional investigations generally. Consequently, it is necessary that the indictment identify and describe with particularity the "question under inquiry" to which the questions put to the witness are deemed pertinent. *Sinclair* v. *United States*, *supra*. This, the indictment fails to do. Indeed, as the indictment stands, the "question then under inquiry" might have been the entire range of subjects committed for investigation to the Committee by House Resolution 5. But the indictment does not so state. And it was for

[26] As Judge Rifkind has put it: "Where the definition of the crime is in generic terms, the charge must not be couched in the same terms but it must descend to particulars." *United States* v. *Waltham Watch Co.*, 47 F. Supp. 524 (D.C.N.Y.).

the grand jury and not the prosecutor to say so. Furthermore, the questions put to petitioner certainly were not—indeed it is hardly conceivable that any question could be—pertinent to all of the matters in the Committee's jurisdiction.

Pleading, as Chief Judge Clark remarked in the *Lamont* case (236 F.2d 313, 317, C.A. 2), is a "practical thing," and he went on to contrast the "over-elaboration" which in former times often defeated its purpose with the "formalism of generality" reflected in indictments such as those involved in that and the present cases. This indictment did not convey the information needed by the trial court to rule on pertinence and by the petitioner to prepare his defense. "The initial step in determining the pertinency of the question is to ascertain the subject matter of the inquiry then being conducted by the subcommittee." See *Bowers* v. *United States*, 202 F.2d 447, 448 (App. D.C.). But the indictment did not enable petitioner or the court to take that first step.

There is no conceivable reason why the court and parties should be obliged to guess at the "question then under inquiry" which, if unspecified, leaves the allegation of pertinency meaningless. In this respect, the indictment may be usefully contrasted with the recent indictments in the Second Circuit, *United States* v. *Seeger*, No. C-152-240; *United States* v. *Yarus*, No. C-152-239; *United States* v. *Sullivan*, No. C-152-238, and with those in such comparable cases as *United States* v. *Debrow*, 346 U.S. 374; *United States* v. *Lattimore*, 215 F.2d 847 (App. D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D.C.D.C.); and *United States* v. *Fields*, 6 F.R.D. 203 (D.C.D.C.).

In *United States* v. *Seeger* and companion cases, *supra*, the indictments state that pursuant to authorization the Committee on Un-American Activities "directed that an

investigation be conducted of Communist infiltration in the field of entertainment in New York." In the *Debrow* case, the defendant was indicted for giving a false answer to questions put to him at a hearing of a subcommittee of the Senate Committee on Expenditures in the Executive Departments. Just as "pertinency" is an essential element of the crime under 2 U.S.C. 192, so is "materiality" an essential element of the crime of perjury before a congressional committee and, as the Supreme Court has declared: "The question of pertinency • • • is not essentially different from the question as to the materiality of false testimony charged as perjury in prosecutions for that crime." See *Sinclair* v. *United States, supra* at p. 298. The indictment in the *Debrow* case[27] unlike that in the present case, contained a very explicit allegation that the subcommittee "was conducting a study and investigation of whether applicants for appointments to offices and places under the Government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments • • • ." Thereafter, the questions put to the defendant were set forth in context, so that their materiality to the question under inquiry was supported by the facts set forth in the indictment, and not by a bare allegation, as in the present case.

The same specificity of allegation was present in the *Icardi* case, *supra*, where the charge that the questions put to the defendant were material was supported by a statement that the matter under inquiry by the special subcommittee was " • • • the circumstances surrounding the disappearance and death of Major William V. Holohan

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[27] The indictment in the *Debrow* case is set forth in the opinion below, 203 F. 2d 699, at 702-703 (C.A. 5).

while a member of the armed forces of the United States on assignment to the Office of Strategic Services in the Italian campaign of 1944." [28]

The *Fields* case, *supra*, is a good illustration of Chief Judge Clark's observations, quoted above, about the practical aspects of pleadings. There the defendant was indicted under 2 U.S.C. 192 for failing to produce documents in response to a subpoena issued by a special investigating committee of the House of Representatives. The indictment did not contain a formal allegation of pertinency, but it did contain a full description of the matter which the committee had under inquiry, so that the facts supporting the element of pertinency were set forth.[29]

There is surely no reason why the present indictment should not be held to similar standards of sufficiency. No problem peculiar to this particular area affords any justification for this looseness, as the *Lattimore* case, *supra*, demonstrates. The indictment in the *Lattimore* case described the general scope of the subcommittee's function as set forth in the authorizing Senate resolution, and then

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[28] The indictment is on file in the district court, Criminal No. 821-55.

[29] Sustaining the sufficiency of the indictment, Judge Holtzoff pointed out (6 F.R.D. at 204):

> "It sets forth that the House of Representatives of the United States, by resolution identified in the indictment, created a committee to investigate the sale or other disposition of property which the United States had acquired in connection with the national defense. The indictment then enumerates certain specific items which the resolution directed the committee to investigate. The indictment further alleges that the defendant was summoned to produce certain documents concerning one of the items which it appears from the indictment the committee was authorized to investigate."

carefully specified the question under inquiry at the time of the defendant's appearance.[30]

By a closely-divided vote, the Court of Appeals held that two of the questions put to Lattimore were not immaterial "from the face of the indictment."[31] This circumstance strongly suggests that the Government has resorted to a vague and loosely drawn accusation in the present case because a properly-drawn indictment would at once disclose

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[30] It stated (215 F.2d at 856-857):

"2. That at the time and place aforesaid, the said Senate Subcommittee, inquiring as aforesaid, was conducting a study and investigation of the administration, operation, and enforcement of laws, relating to espionage, sabotage, and the protection of the internal security of the United States, and of the extent, nature, and effects of subversive activities in the United States; including but not limited to the extent to which the Institute of Pacific Relations was infiltrated and influenced or controlled by agents of the Communist world movement; the extent to which these agents and their sympathizers worked through the Institute into the United States Government to the point where they exerted influence on the United States Far Eastern policy, and the extent to which they still exert such influence; and the extent to which such agents and their sympathizers misled American public opinion, particularly with regard to Far Eastern policy.

"3. That it was material to the study and investigation to ascertain the extent to which the Institute of Pacific Relations had been infiltrated and influenced by agents of the Communist world movement and their sympathizers and the extent to which any of these persons had exerted influence on United States Far Eastern policy from posts they secured in the United States Government; or had influenced American public opinion with reference to said policy; and what participation in or knowledge of any such situation described above was had by Owen Lattimore, who had been an important figure in the Institute of Pacific Relations, and editor of one of its official publications, 'Pacific Affairs', and who had been an official of the United States Government; and it was further material to ascertain whether Lattimore himself had been a promoter of Communism or Communist interests."

[31] (215 F.2d at 853) Four of the nine judges dissented on the ground that all of the questions put to Lattimore were immaterial on the face of the indictment.

that the questions put to petitioner were not in pursuance of and pertinent to a valid legislative subject matter.[32]

B. The Failure to Allege That Petitioner Acted Wilfully

In the *Lamont* case, District Judge Weinfeld held (18 F.R.D. 27) that the indictments involved there were fatally defective for failure to allege that the refusals were "deliberate" or wilful. The decisions of this Court, upon which Judge Weinfeld relied, in *Quinn*, 349 U.S. 155, and in *Bart*, 349 U.S. 219, seem to us to dispose of this matter. In *Quinn* the Court held (at 165) that, "Section 192, like the ordinary federal criminal statute, requires a criminal intent —in this instance, a deliberate, intentional refusal to answer." The Court further ruled that, "This element of the offense, like any other, must be proved beyond a reasonable doubt."

If a deliberate, intentional refusal is an element of the offense which must be proven, it must also be alleged in the indictment. *United States* v. *Hess*, 124 U.S. 483.

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[32] In *United States* v. *Kamin*, 135 F. Supp. 382 and 136 F. Supp. 791 (D.C. Mass.), District Judge Aldrich denied a motion to dismiss a comparable indictment. The case went to trial, and Judge Aldrich dismissed some of the counts at the conclusion of the Government's case and directed a verdict of acquittal at the end of the trial, basing his rulings on the lack of pertinent relation between the questions put to the defendant at the subcommittee's hearing, and the matters into which the subcommittee was authorized to inquire. These defects would have been plainly disclosed by a properly-drawn indictment and "an unnecessary trial might have been averted had it been made clear in advance thereof that there was lacking an essential element of the crime charged, namely, that the inquiry was within the subcommittee's authority." *United States* v. *Lamont*, *supra*, at 315.

VII. Petitioner Was Deprived of His Right to a Fair and Impartial Grand Jury.

Petitioner sought by motion a dismissal of the indictment or a preliminary hearing on the ground that eleven members of the indicting grand jury were government employees and that the loyalty-security program had engendered fears among government employees which created actual bias and prejudice against petitioner. In the interest of brevity and the convenience of the Court, we rely on Argument I of the Brief for Petitioner in *Russell* v. *United States*, No. 8. Unlike the *Russell* case, petitioner did not show that a majority of the grand jurors were government employees. But, we submit, a hearing would have determined not only whether the government employees were biased, but also whether that bias was communicated to the other grand jurors.

Conclusion

For all the above reasons the conviction should be reversed with directions to dismiss.

Respectfully submitted,

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